318.

SUPREME COURT OF THE UNITED STATES.

No. 55.

WILLIAM ROSS AND HENRY KING, PLAINTIFFS

IN ERROR,

VERSUS

JAMES S. DUVAL, ET AL.

ERROR TO THE CIRCUIT COURT UNITED STATES FOR EAST VIRGINIA.

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Pleas held at the city hall, in the city of Richmond, on Tuesday, the 29th day of November, A. D. 1836, before the honorable Philip P. Barbour, judge of the court of the United States for the fifth circuit and eastern district of Virginia, and the honorable Peter V. Daniel, judge of the eastern district of Virginia—

Be it remembered, that, heretofore, to wit: at a court of the United States for the fifth circuit and eastern district of Virginia, held at the city hall, in the city of Richmond, on Tuesday, the 22d day of November, A. D. 1836, on the motion of James S. Duval, Lewis Duval, and John Reinhard, plaintiffs, against William Ross and Henry King, defendants, upon a bond for the forthcoming of property on the day of sale; which bond, with the endorsement thereon, is in these words and figures, to wit:

$1,966 52
2

$3,933 04

Know all men by these presents, that we, William Ross and Henry King, are held and firmly bound unto James S. Duval, Lewis Duval, and John Reinhard, in the just and full sum of three thousand nine hundred and thirty-three dollars and four cents, to be paid unto the said James S. Duval, Lewis Duval, and John Reinhard, their certain attorney, heirs, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, jointly and severally, and each of our joint and several heirs, executors, and administrators, firmly by these presents.

Sealed with our seals, and dated this 12th day of August, one thousand eight hundred and thirty-six.

The condition of the above obligation is such, that, whereas, James S. Duval, Lewis Duval, and John Reinhard, *hath* sued out of the court of the United States for the fifth circuit and eastern Virginia district, a writ of capias ad satisfaciendum against the body of the above bound William Ross, upon a judgment obtained in the said court; which writ, with the legal costs attending the same, amounts to the sum of nineteen hundred and sixty-six dollars and fifty-two cents, and directed to the marshal of the Virginia district; and whereas, William A. Carter, deputy for Edmund Christian, marshal of the said district of Virginia, by virtue of the said writ, hath taken the body of the above bound William Ross to satisfy the same: who, thereupon, at the time of levying the said writ, tendered to the said William A. Carter, deputy as aforesaid, the following property, to satisfy the same, to wit: One n–gro man, James, 4 negro women, Patsy, Judy, Malinda, and Mary, and the said William Ross being desirous of keeping the same in his possession until the day of sale thereof, hath tendered the above bound Henry King as security for

the forthcoming and delivery thereof, on the day and at the place of sale. Now, if the above bound William Ross and Henry King, or either of them, do and shall deliver the aforesaid property to the said marshal of the Virginia district, or either of his deputies, at the Eagle Hotel, in the city of Richmond, on the first Monday of October, 1836, next, then and there to be sold, to satisfy the said execution, then the above obligation to be void, else to remain in full force and virtue.

WILLIAM ROSS. [SEAL.]
HENRY KING. [SEAL.]

Signed and delivered in the presence of
WM. A. CARTER.

[Endorsement.]

Executing notice on William Ross and Henry King.
Service on 2 d'fts - - - - - $4 00
WM. A. CARTER, *D. M.*
For EDMUND CHRISTIAN, *M. E. V. D.*

Came the plaintiffs by their attorney, and moved the court for award of execution on the said bond.

Whereupon, came the defendants by their attorney, and moved the court to quash the said bond and the execution therein mentioned, upon the ground that the judgment on which the said execution issued, was obtained at November term, 1821, and that only one execution had issued in the case before that moved to be quashed, which execution so previously issued, was on the tenth day of January, 1822, and no return had been made thereon. And upon this ground, the said defendants insisted that the plaintiffs could only lawfully obtain other executions for the term of ten years from the date of the judgment, unless the plaintiffs, at the time of the judgment, were under the age of twenty-one years, *non compos mentis*, imprisoned, or not within the Commonwealth of Virginia. And the said defendants further insisted, that even if the plaintiffs were not within the Commonwealth of Virginia at the time of the judgment, they could not lawfully obtain other executions after ten years from the date of the act of limitations, passed by the General Assembly of Virginia, on the 8th day of March, 1826. And thereupon, on the motion of the plaintiffs, this cause is continued until to-morrow to be argued.

And at another day, to wit, at a court of the United States for the fifth circuit and eastern district of Virginia, held at the city hall, in the city of Richmond, on Wednesday, the 23d day of November, A. D. 1836.

By consent of the parties by their attorneys, and with the assent of the court, this cause is continued until Saturday, the 26th day of this month.

And at another day, to wit, at a court of the United States for the fifth circuit and eastern district of Virginia, held at the city hall, in city of Richmond, on Saturday, the 26th day of November, A. D. 1836, came again the parties by their attorneys, who being fully heard, it is ordered that this cause be continued until Monday next, for the court to consider thereof.

And at another day, to wit, at a court of the United States for the fifth circuit and eastern district of Virginia, held at the city hall, in the city of Richmond, on Monday, the 28th day of November, A. D. 1836, came again the parties by their attorneys, and by their consent, and with the assent of the court this cause is continued until to-morrow.

And now, at this day, to wit, the day and year first herein mentioned, came the parties by their attorneys, and leave is granted to William A. Carter, D. M., for Edmund Christian, marshal of the eastern district of Virginia, to amend his return upon the execution sued out in this cause by altering the spelling of the word "discharge," which is accordingly done, and the motion to quash the said bond and the execution therein mentioned, submitted by the counsel for the defendants having been maturely considered by the court, is overruled.

Therefore, it is considered by the court, that the plaintiffs may have execution against the defendants for three thousand nine hundred and thirty-three dollars and four cents, the penalty of the said bond, and their costs by them about their motion in this behalf expended. And the defendants, in mercy, &c.

But this judgment may be discharged by the payment of nineteen hundred and sixty-six dollars and fifty-two cents, with interest thereon, to be computed after the rate of six per centum per annum, from the 12th day of August, 1836, till payment and the costs.

On the trial of this cause, the defendants, by their attorney, excepted to the opinion of the court overruling the said motion to quash the said bond, and the execution therein mentioned, heretofore submitted by them, and giving judgment thereon for the plaintiffs, and tendered their bill of exceptions, which was received, signed and sealed by court, and ordered to be made a part of the record; which bill of exceptions is in the words and figures following, to wit:

MEMORANDUM.

Be it remembered, that upon the hearing of this case, legal notice of the motion was admitted, and the parties gave in evidence the record and proceedings in the original action against the defendant Ross, in the words following, to wit:

Pleas held at the capitol, in the city of Richmond, on the 7th day of December, 1821, before the honorable John Marshall, chief justice of the United States—

Be it remembered, that, heretofore, to wit, at rules held in the clerk's office of the court of the United States for the fifth circuit and Virginia district, in the month of April, A. Domini 1821,

came James S. Duval, Lewis Duval, and John Reinhard, and sued out of the said office a capias ad respondendum against the body of William Ross, which writ, with the endorsement and return thereon, is in the following words and figures, to wit:

The President of the United States of America to the marshal of the Virginia district, *greeting:*

You are hereby commanded to take William Ross, if he be found within your district, and him safely keep, so that you have his body before the judges of the court of the United States for the fifth circuit in the Virginia district, at the city of Richmond, on the 22d day of May next, to answer James S. Duval, Lewis Duval, and John Reinhard, merchants, and partners, under the firm of Duval & Co. indorsees of Randolph Ross, of a plea of debt for $1,776 56 cents. Dam. $2,000. And have then there this writ.

Witness, John Marshall, Esq. chief justice of the United States at Richmond, this tenth day of April, one thousand eight hundred and twenty-one, and in the 45th year of the independence of the United States of America.

RD. JEFFRIES, *Clerk.*

[Endorsement.]

Debt on note.
Bail is required.

UPSHUR, P. Q.

Return. Not found.

GEO. JAMES, *D. M.*

And at another day, to wit, at rules holden in the clerk's office of the court aforesaid, in the month of June, A. D. 1821, came the said James S. Duval, Lewis Duval, and John Reinhard, by their attorney, and sued out of the said office an alias capias ad respondendum against the said William Ross, which writ, with the endorsement and return thereon, is in the words and figures following, to wit:

The President of the United States of America to the marshal of the Virginia district, *greeting:*

You are hereby commanded, as at another time you have been commanded, to take William Ross, if he be found within your district, and him safely keep, so that you have his body before the judges of the court of the United States for the fifth circuit, in the Virginia district at the city of Richmond, on the seventh day of September next, to answer James S. Duval, Lewis Duval, and John Reinhard, merchants and partners, under the firm of Duval & Co. indorsees of

Randolph Ross, of a plea of debt for $1,776 56 cents. Dam. $2,000. And have then there this writ:

Witness, John Marshall, Esq. chief justice of the United States at Richmond, this seventh day of June, one thousand eight hundred and twenty-one, and in the 45th year of the independence of the United States of America.

RD. JEFFRIES, *Clerk.*

[Endorsement.]

Debt on note.
Bail is required.

UPSHUR, P. Q.

Return. Executed on the defendant by reading the writ to him. He would not surrender his body, nor give bail; but kept me off by force of armes.

Service - - - - - - -	$2 00
200 miles - - - - - - -	10 00
	$12 00

A. R. THORNTON, *D. M.*
For JOHN PEGRAM, *M. V. D.*

And at another day, to wit, at rules holden in the clerk's office aforesaid, in the month of September, A. D. 1821, came the said James S. Duval, Lewis Duval, and John Reinhard, by their attorney, and filed their certain bill against the said William Ross, which bill is in the words following, to wit:

UNITED STATES, 5TH CIRCUIT,
Virginia District, to wit:

James S. Duval, Lewis Duval, and John Reinhard, merchants and partners, trading under the firm and by the name and style of Duval & Co. of Philadelphia, in Pennsylvania, indorsees of Randolph Ross, complain of William Ross, a citizen of Virginia, in custody, &c, of a plea of debt, that he render to them seventeen hundred and seventy-six dollars and fifty-six cents, which to *him* he owes, and from *him* unjustly detains, for that the said William Ross, heretofore, to wit, on the 15th September, 1820, at Philadelphia, to wit, at Virginia, aforesaid, made his certain note, commonly called a promissory note, whereby he promised to pay, four months after the date of the said promissory note, for value received, to the order of Randolph Ross, seventeen hundred seventy six dollars fifty-six cents, negotiable and payable at the Office of Discount and Deposit of the Bank of the United States at Richmond, and did then and there deliver the said

note to the said Randolph Ross, who then and there, it being wholly unpaid for value received, indorsed the same to the plaintiffs, of which the said William then and there had notice, whereby, and by virtue of the laws in such case made and provided, action hath accrued to the said plaintiffs, to have and demand the said sum of $1,776 56 of the said William. Nevertheless, the said William, the said sum to the said Randolph did not pay, before the indorsement and notice as aforesaid, nor hath he at any time paid the same, nor any part thereof to the plaintiffs, although often requested, but the same to pay hath hitherto wholly refused, and still doth refuse, to the damage of the plaintiffs $2,000, and therefore *he* brings suit.

UPSHUR, P. Q.

Whereupon, the defendant being arrested, and not appearing, on the motion of the plaintiffs, by their attorney, it was ordered, that judgment be entered for the plaintiffs against the defendant, for the debt and interest in the declaration mentioned, and also for the damages which the plaintiffs had sustained by occasion of the detention of the said debt, unless the defendant should appear and plead to issue at the then next rules.

At which day, to wit, at rules holden in the clerk's office of the court aforesaid, in the month of August, A. D. 1821, the defendant still failing to appear, on the motion of the plaintiffs, by their attorney, it was ordered, that the last order made against him in this cause, be confirmed; and that the damages which the plaintiffs have sustained by occasion of the detention of their debt, be ascertained by a jury at the next term.

And now at this day, to wit, the day and year first herein mentioned, to wit, on the seventh day of December, A. D. 1821, came the plaintiffs, by their attorney, and the defendant being solemnly called, came not, thereupon came a jury, to wit, Lysander Smith, Elijah Brown, Wm. J. Robertson, James H. Lynch, Thomas Ball, Thomas Cowles, John Rutherford, David Holloway, Thomas Hickson, D. Trueheart, Christopher Tompkins, and Thomas Underwood, who being elected, tried and sworn, well and truly to inquire of damages in this cause, upon their oath do say, that the plaintiffs have sustained damages by occasion of the detention of the debt in the declaration mentioned, to the amount of ninety-eight dollars seventy-one cents. Therefore, it is considered by the court, that the plaintiffs recover against the defendant seventeen hundred and seventy-six dollars fifty six cents, the debt in the declaration mentioned, together with their damages above assessed, and their costs by them, about their suit in this behalf expended. And the defendant, in mercy, &c."

And it appeared to the court, that on the said judgment, a writ of fieri facias issued on the tenth day of January, 1822, which was delivered to Abel P. Upshur, Esq. the attorney for the plaintiffs in the said action, and had never been returned, and it farther appeared that no other execution issued on the said judgment, until the eleventh

day of August, 1836, when a writ of capias ad satisfaction was sued out, which, with the return thereon, is in the words following, to wit:

The President of the United States of America to the marshal of the eastern district of Virginia, *greeting:*

You are hereby commanded to take William Ross, if he be found within your district, and him safely keep, so that you have his body before the judges of the court of the United States for the 5th circuit and eastern Virginia district, at the city of Richmond, on the 22d day of November next, to satisfy James S. Duval, Lewis Duval, and John Reinhard, seventeen hundred and seventy-six dollars and fifty-six cents, which the said James S. Duval, Lewis Duval, and John Reinhard, late in the said court recovered against the said William Ross for debt; also, ninety-eight dollars and seventy-one cents, and forty-one dollars and ninety-one cents, which, to the said James S. Duval, Lewis Duval, and John Reinhard, in the same court were adjudged, as well for their damages, which they sustained by occasion of the detention of the said debt, as for their costs by them about their suit in that behalf expended, whereof the said William Ross is convict, as appears to us of record. And have then there this writ.

Witness Roger B. Taney, Esq. chief justice of the United States at Richmond, this twelfth day of August, one thousand eight hundred and thirty-six, and in the sixty-first year of the independence of the United States of America.

HENRY GIBSON, *Clerk.*

Return. Executed on the body of Wm. Ross, August 12th, 1836, and thereupon he gave up in discharge of his body, one negro man, named, and four negro women, namely, Patsey, Judy, Malinda and Mary, and entered into a bond for the delivery of same, with Henry King as security, which bond is forfeited, and herewith returned.

WM. A. CARTER, *D. M.*
For EDMUND CHRISTIAN, *M. E. V. D.*

And the bond upon which the plaintiffs moved for award of execution, was given in evidence in the words following, to wit:

$1,966 52
2

$3,933 04

Know all men by these presents, that we, William Ross and Henry King, are held and firmly bound unto James S. Duval, Lewis Duval, and John Reinhard, in the just and full sum of three thousand nine hundred and thirty-three dollars and four cents, to be paid unto the said James S. Duval, Lewis Duval, and John Reinhard, their certain attorney, heirs, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, jointly and

severally, and each of our joint and several heirs, executors and administrators, firmly by these presents.

Sealed with our seals, and dated this 12th day of August, one thousand eight hundred and thirty-six.

The condition of the above obligation is such, that, whereas, James S. Duval, Lewis Duval, and John Reinhard, *hath* sued out of the court of the United States for the 5th circuit and eastern Virginia district, a writ of capias ad satisfaciendum against the body of the above bound William Ross, upon a judgment obtained in the said court; which writ, with the legal costs attending the same, amounts to the sum of nineteen hundred and sixty-six dollars and fifty-two cents, and directed to the marshal of the Virginia district; and whereas, William A. Carter, deputy for Edmund Christian, marshal of the said district of Virginia, by virtue of the said writ, hath taken the body of the above bound William Ross to satisfy the same, who, thereupon, at the time of levying the said writ, tendered to the said Wm. A. Carter, deputy as aforesaid, the following property, to satisfy the same, to wit: One n–gro man, James, 4 negro women, Patsy, Judy, Malinda and Mary, and the said William Ross being desirous of keeping the same in his possession until the day of sale thereof, hath tendered the above bound Henry King as security for the forthcoming and delivery thereof, on the day and at the place of sale. Now, if the above bound William Ross and Henry King, or either of them, do, and shall deliver the aforesaid property to the said marshal of the Virginia district, or either of his deputies, at the Eagle Hotel, in the city of Richmond, on the first Monday of October, 1836, next, then and there to be sold, to satisfy the said executions, then the above obligation to be void, else to remain in full force and virtue.

WILLIAM ROSS. [SEAL.]
HENRY KING. [SEAL.]

Signed and delivered in the presence of

W. A. CARTER.

And it appeared to the court, that on the sixteenth day of December, 1816, the following general rule was adopted by the court of the United States for the fifth circuit and Virginia district, to wit:

GENERAL RULE.

It is ordered, that in future, the rules of practice on the common law side of this court with respect to the suing out of original and mesne process and returns thereof, and all orders and rules of course, at the rules and in term, and all commissions for taking the depositions of witnesses, and the like, until judgment rendered, shall be the same with the present rules of practice of the superior courts of law of Virginia; and that the rules of practice on the chancery side of this court, with respect to the suing out of original and mesne process and returns thereof, and all orders and rules of course, at the

rules or in term, and all commissions for taking depositions, and the like, until final decree, shall be the same with the present rules of practice of the superior court of chancery of Virginia, as established by law, except only in cases wherein particular provision is made by the laws of the United States, different from or contrary to the rules of practice of the State courts respectively.

And upon the argument of the said case, it was stated by the judges, and admitted by the counsel on both sides, that so far back as the recollection of the said judges and counsel extends, it has been the usage in the county and corporation courts, and in the superior courts of law, and in the general court of Virginia, where execution hath issued upon a judgment, and no return is made thereon, to allow other executions to be issued thereon, notwithstanding the failure to return the first, but the recollection of neither the judges nor the counsel extended farther back than the time when the act of the general assembly of Virginia commenced, which was passed in the year 1792, and now forms the fifth section of the act for limitation of acts contained in the first volume of the revised code of 1819, page 489. And it was conceded, that according to the law of Virginia, no execution ever issues from the court of appeals, which is the supreme court in civil cases, nor was it lawful to issue executions from that court at the time when the act passed to regulate processes in the courts of the United States, or at any time since. And it was further conceded, that in regard to executions, and the mode of proceeding under the same, there has been no regulation by any rule of the circuit court of the United States for the district before mentioned, unless the rule of the 16th December, 1816, can be considered as extending to the same.

Whereupon, the counsel for the defendants insisted that the law of the State of Virginia, applicable to similar cases in the courts of that State, was to be regarded as the rule of decision in this case, and that, according to that law, where execution had issued, and no return was made thereon, the party in whose favor the same was issued, might obtain other executions for the term of ten years from the date of the judgment, and not after.

And the said counsel further insisted, that even if the plaintiffs could be presumed to have been not within the Commonwealth at the time the judgment was obtained, and on that account, entitled to the benefit of the proviso contained in the sixth section of the act of Virginia, in the first volume of the revised code of 1819, page 489, yet that by an act of the general assembly of Virginia, passed on the eighth day of March, 1826, contained in the session acts of 1825—6, page , and in the supplement to the revised code of 1819, page , the benefit of that proviso could no longer avail after the expiration of ten years from the date of the last mentioned act. And on that ground, moved the court to quash the execution and forthcoming bond founded thereon. But the court being of opinion that, although the act of limitations of Virginia would, as a rule of decision, govern its opinion in making up its judgment, under the 34th section of the

judiciary act of the United States, yet that it did not apply to executions issued on judgments in the courts of the United States, but that said executions, and all proceedings thereon, were to be governed by the process acts of the United States; and those acts referring to, and adopting the modes and forms of proceeding as used in the several States, in the year 1789, and being satisfied as well from the facts before stated in this bill of exceptions, as from what they consider a declaration of the law by the legislature of Virginia, in the act of 1792, before referred to, that it was in 1789, when the judiciary act passed, and ever since, had been the usage and practice in Virginia, that an execution issued within the year, though not returned, enabled the party issue other executions thereon, after the year, indefinitely as to time, overruled the defendant's motion to quash, and awarded execution on the forthcoming bond. To which opinion and judgment of the court, the defendants except, and pray their exception to be signed and sealed, which is done accordingly.

P. V. DANIEL. [SEAL.]
P. P. BARBOUR. [SEAL.]

UNITED STATES OF AMERICA,
Virginia, to wit:

I, Henry Gibson, clerk of the court of the United States for the 5th circuit and eastern district of Virginia, do hereby certify, that the foregoing is a true transcript of the record and proceedings in a certain motion on a bond for the forthcoming of property at the day of sale, lately depending in the said court of the United States for the 5th circuit and eastern district of Virginia, between James S. Duval, Lewis Duval, and John Reinhard, plaintiffs, and William Ross and Henry King, defendants, with all things touching the same, as wholly as they now exist, among the re office.

In testimony whereof, I hereunto set my hand, and annex the seal of the said court, this 22d day of December, A. D. 1836, [L. S.] and of the independence of the United States of America the sixty-first.

HENRY GIBSON, *Clerk.*

PLAINTIFFS COSTS.

Attorney - - - - -	$20 00
Clerk - - - - -	15 20
Marshal - - - - -	4 00
	$39 20
Record - - - - -	9 86
	$49 06
Authentication and seal - - - -	2 66⅔
	$51 72⅔

UNITED STATES OF AMERICA,
Virginia, to wit:

I, Peter V. Daniel, Judge of the United States for the eastern district of Virginia, do certify, that Henry Gibson, who hath given the preceding certificate, is clerk of the court of the United States for the fifth circuit and eastern district of Virginia; and that his said attestation is in due form.

Given under my hand, this 25th day of January, 1837.

PETER V. DANIEL.

UNITED STATES OF AMERICA, to wit:

The President of the United States to the judges of the court of the United States for the fifth circuit and eastern district of Virginia, *greeting*:

Because, in the record and proceedings, as also in the rendition of the judgment upon a motion in the said court, before you, or some of you, between James S. Duval, Lewis Duval, and John Reinhard, plaintiffs, and William Ross and Henry King, defendants, a manifest error hath happened, to the great damage of the said William Ross and Henry King, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of January next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right, and according to the laws and custom of the United States, should be done.

Witness, Roger B. Taney, chief justice of the said Supreme Court, the twenty-ninth day of November, in the year one thousand eight hundred and thirty-six.

HENRY GIBSON.

Clerk of the court of the United States for the fifth circuit and eastern district of Virginia.

I acknowledge service of the above citation.

JOSEPH MAYO,
Attorney for plaintiffs, Duval, and others.

United States of America to James S. Duval, Lewis Duval, and John Reinhard, *greeting*:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on